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NO. 84-2005

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

Ex parte:

RANDY ELI GROTHE,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF IN OPPOSITION

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October 4, 1985.

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OPINION BELOW

The opinion of the Texas Court of Criminal Appeals affirming the judgment of the trial court below is reported in *Ex parte Randy Eli GROTHE, 687 S.W.2d 736 (Tex. Crim. App. 1984)* rehearing denied April 24, 1985. The Respondent, the Honorable Robert Moss, is the Judge of the County Criminal Court No. 10 of Dallas County, Texas, who held the Petitioner in contempt, said holding forming the basis for the instant cause.

JURISDICTION

Respondent accepts Petitioner's jurisdictional statement.

QUESTION PRESENTED

Whether the First Amendment to the United States Constitution creates an evidentiary privilege whereby photo journalists are excused from testifying and from producing photographs of alleged criminal activity witnessed by the journalist in a public place.

STATEMENT OF THE CASE

This petition deals with a prosecution for obstructing a public passageway wherein the key issue was whether the accused had chained himself to a doorway during a protest. See: *TEX. PENAL CODE ANN. sec. 42.03 (a) (1) (1974).*

Briefly, the accused sought to subpoena a newspaper photographer who had been present as a witness to the events. The photographer refused to divulge the contents of his photographs, urging an alleged constitutional evidentiary privilege based upon the First Amendment to the United States Constitution. The judge of the County Criminal Court No. 10 of Dallas County, the Honorable Robert Moss, denied the asserted privilege and held the photographer in contempt, whereupon the photographer filed an Application for Writ of Habeas Corpus. The Court of Criminal Appeals held that the photographer did not have a First Amendment privilege to refuse to produce photographs of alleged criminal offenses occurring in a public place, and was properly held in contempt for his failure to produce the required material. *Ex parte Grothe, supra.*

The relevant facts are as follows: The Petitioner is and was at all relevant times employed as a photographer for the Dallas Morning News.

Defendant MAVIS BELISLE was charged with violation of section 42.03 of the Texas Penal Code alleging an

obstruction of a public passageway in cause No. MA83-79866-L. Specifically, it was alleged that the defendant obstructed a passageway of the Dallas Power and Light building "by chaining himself to the said doorway of a public building". The case was assigned to County Criminal Court No. 10 of Dallas County, Texas, Judge Robert Moss presiding. The case was set on the docket of the Court for trial before the court on April 11, 1984. On April 10, 1984 student-counsel for the defendant filed an application for subpoena with the trial court to secure the attendance of a material and relevant witness, RANDY ELI GROTHE.

The case was called for trial on April 11, 1984 and both sides announced ready; counsel for the Petitioner, however, filed a Motion to Quash the subpoena requested by the defense. A hearing was then conducted on this Motion.

Student-counsel[1] testified that the Petitioner had relevant information concerning the issues to be litigated in the lawsuit. His investigation had revealed that Petitioner was present at the scene and observed the alleged offense. (R.II-2). The student-counsel testified that he believed the Petitioner to be an objective and unbiased observer to the incident which formed the basis for the criminal prosecution at issue. The allegations of counsel concerning the materiality and relevance of the testimony sought was not and is not contested by Petitioner.

At the conclusion of the hearing on the Motion to Quash the defense subpoena, the trial court entered findings of fact concerning the issues presented therein. Based upon the

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[1]*TEX. REV. CIV. STAT. ANN. art. 320a-1 (10) (a) (1979)* (Texas Third-Year Student Practice Act). This statutory provision permits third-year law students to appear as counsel in Texas courts under direct supervision of a licensed attorney.

testimony, the trial court ruled that the Petitioner was a witness to the offense as it occurred. The court further found that his testimony concerning this incident would be relevant to the issues to be litigated. The court noted that even if a First Amendment privilege could be interposed by the Petitioner in his capacity as a photographer for the Dallas Morning News, that this right would fall when in conflict with the right of the accused to present a defense. The trial court, therefore, entered an order denying the Motion to Quash the Subpoena. The trial was recessed until the following day. No immediate appeal was taken from the trial court's denial of this Motion since such is not permitted by Texas procedure.

The next morning the trial began. The State called the arresting officer and a security guard for Dallas Power and Light, both of whom testified to having personally observed the defendant chained to the doorway. The defendant admitted participation in the demonstration but specifically denied she had at any time been chained to the building. The defense also called another of the demonstrators (who was allegedly closest to the defendant) who corroborated the defendant's testimony. The central issue at trial was thus whether the defendant was chained to the doorway as alleged.

The defense then called the Petitioner to testify. (R.II-90). Prior to testifying, Petitioner's counsel advised the trial court that, although the Petitioner disagreed with the court's ruling on the Motion to Quash Subpoena, the Petitioner would nevertheless voluntarily testify. It was Petitioner's stated position at this point of the trial that he was an eyewitness to the event and could be called upon to testify as could any other citizen witness. (R.III- 91). Thereafter, the Petitioner did in fact testify.

Having expressly waived his alleged First Amendment privilege against testifying, the Petitioner was sworn as a witness. (R.II- 94). Prior to his examination by counsel for the defendant, a voir dire examination of the Petitioner was conducted by his own counsel. In that examination it was revealed that the Petitioner was a professional photographer for the Dallas Morning News. (R.III- 94). On September 23, 1983, he was present at a demonstration near the Dallas Power and Light Building in Dallas, Texas. He was present in his capacity as a photographer on assignment from his employer. (R.III- 95). At this point, counsel for Petitioner urged an objection to any further testimony by the witness on the basis of an alleged journalist's privilege founded in the First Amendment to the United States Constitution and Article I, Section 8 of the Texas Constitution. No ruling was obtained on this objection. Thereafter, the witness was examined by counsel for the Defendant. (R.III- 96).

The Petitioner admitted that he was present at the scene when the alleged offense occurred. (R.III- 98). Several pictures of the scene were taken, including one that was published in the newspaper. (R.III- 101). Pictures were being taken while the alleged offense was occurring. (R.III- 106). The Petitioner testified that he did not recall how many people were chained in the area. (R.III- 109). He further testified that reviewing of the unpublished photographs would aid his recollection of the events of the day. (R.III- 109).

The examination of the Petitioner was interrupted and counsel for the defendant requested that the witness be allowed to use the unpublished photographs to refresh his recollection and to testify thereafter. (R.III- 109). At this point counsel for Petitioner objected to this procedure and again interposed an alleged journalist's privilege based on

the First Amendment to the United States Constitution and Article I, section 8 of the Texas Constitution.

A lengthy discussion then ensued between the Respondent, defense counsel, the prosecution, and counsel for the Petitioner. It was the Petitioner's stated view that he would refuse to honor an Order of the court to review the material. At the conclusion of this discussion, the Respondent ruled that the ends of justice required that the witness be ordered to obtain the pictures and bring them to court for two purposes: first, to refresh his recollection to aid him in testifying; and, second, so that the photographs might be examined for the purposes of cross-examination by the State. The Petitioner was instructed to return with the photographs at 2:00 p.m. and the court recessed. (R.III- 129).

Later that day the trial was continued. The Petitioner was present and stated to the Respondent that, although he had adequate time to secure the photographs in issue, he refused to do so, relying on his alleged journalist's privilege. (R.III-131). The respondent ruled that the Petitioner had committed an act of direct contempt in failing to comply with the order of the court and the Petitioner was ordered confined until he purged himself of the contempt. Bond was posted on behalf of the Petitioner.

The Petitioner challenged the judgment of the trial court by means of an Application for Writ of Habeas Corpus asking the Texas Court of Criminal Appeals to relieve him from an order of contempt entered by the Respondent judge during the pendency of this criminal trial. See: Article V, section 5, Texas Constitution and *Ex parte Sheppard, 547 S.W.2d 414 (Tex. Crim. App. 1977).* The application presented one narrow question, to-wit: does the First Amendment to the United States Constitution or Article I, section 8 of the Texas Constitution create a privilege whereby photo

journalists are excused from testifying and producing photographs of alleged criminal activities witnessed in a public place. On July 3, 1984, the Texas Court of Criminal Appeals answered this question in the negative and denied the relief requested. The Petitioner filed a Motion for Rehearing from this decision and on April 24, 1985, the Court of Criminal Appeals denied this final motion. The trial in this cause is in recess pending the outcome of these proceedings.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Court of Criminal Appeals fully considered and correctly decided the issues presented to it by the Petitioner.

2. The Petitioner's argument that the First Amendment created a qualified evidentiary privilege with respect to testimony concerning alleged criminal conduct which he witnessed in a public place is without merit.

A. The Petitioner has misconstrued the prior holdings of this Honorable Court.

B. The Petitioner has misconstrued the prior relevant holdings of the several Courts of Appeal.

C. The allegedly conflicting decisions are distinguishable on their facts.

D. The allegedly conflicting decisions are distinguishable on the law.

SUMMARY OF THE ARGUMENTS

The Petitioner claims that the instant cause reflects an example of the indiscriminate and unthinking service of a subpoena upon a member of the news media. The facts of this case do not support the Petitioner's claims. Here, a member of the media was an eye-witness to alleged criminal

activity, the only objective and unbiased witness known to be available. The witness had in his possession photographs which would have squarely resolved the question of criminal liability of the accused. The Petitioner, when requested to produce those photographs, refused, claiming an alleged journalist's privilege to refuse to testify purportedly based in this Honorable Court's opinion in *Branzburg v. Hayes, 408 U.S. 665 (1972).*

The Respondent respectfully submits that the Petitioner has misconstrued this Honorable Court's holding in *Branzburg, supra,* as well as subsequent holdings in this area by both this Honorable Court and the lower Federal Courts. Further, the instant Petition contains numerous other misrepresentations concerning the holdings of lower courts with respect to this issue. The Respondent respectfully submits that there is no constitutionally mandated "journalist's privilege" as to events to occurring in a public place of which the witness is an eye-witness in in the context of a criminal prosecution.

Assuming, arguendo, that some type of qualified journalist's privilege may exist where that journalist is a witness to an allegedly criminal act, any predicate which would be necessary for requiring the production of said testimony was fully met in this case.

Finally, the alleged journalist's privilege was fully waived during the course of the trial of this cause, and only after such waiver did the witness attempt to urge the alleged privilege. Any claim to a privilege, if any exists, was waived in this cause rendering this case an inappropriate vehicle for clarification of the First Amendment case law as it relates to any alleged "journalist's privilege".

ARGUMENT AND AUTHORITIES

The Petitioner's argument is founded upon the assumption that that this Honorable Court established a limited "journalist's privilege" in its holding in *Branzburg v. Hayes, 408 U.S. 665 (1972).* The Petitioner argues that the combination of the dissenting opinions therein and the concurring opinion of Justice Powell established this privilege. The Respondent respectfully submits that this analysis is without merit and is based upon a misreading of that opinion and a refusal to accept the subsequent explanations and interpretations of that opinion both by this Honorable Court and other courts.

It is axiomatic that a free press exercises an important role in our society. This Honorable Court has stated that the First Amendment guarantee of a free press "assures the maintenance of our political system and an open society." *Time, Inc. v. Hill, 385 U.S. 374 (1967).* See: *Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times v. United States, 403 U.S. 713 (1974).* While the First Amendment bars governmental interference with a free press, it does not provide the press with any greater right of access to information than the general public. *Powell v. Procunier, 417 U.S. 817 (1974).* See also: *Zemel v. Rusk, 381 U.S. 1 (1965)* (right of free press does not provide for unauthorized entry into White House to collect news). Similarly, it it is respectfully submitted that it does not provide the press any greater evidentiary privileges than members of society in general.

The majority opinion in *Branzburg, supra,* specifically rejected a claim of a privilege based upon the right of a free press as contained in the First Amendment to the United States Constitution. In an effort to circumvent that express holding, the Petitioner has attempted to combine the dissenting opinions in *Branzburg, supra,* with the concurring

opinion of Mr. Justice Powell, reading that combination to create the alleged privilege. Petitioner ignores, however, the concurring opinion of Mr. Justice Powell found in *Zurcher v. Stanford-Daily, 436 U.S. 525 (1978)* where he explained his decision in *Branzburg, supra,* in footnote 3 on page 570 of that opinion. Mr. Justice Powell wrote therein as follows:

> The concurring opinion in *Branzburg vs. Hayes, 408 U.S. 655 (709-710), 92 S.Ct. 2646, 2671, 33 L.Ed.2d 626 (1972) (Powell, J.)* does not support the view that the Fourth Amendment contains an implied exception for the press, through the operation of the First Amendment. That opinion noted only that in considering a Motion to Quash a Subpoena directed to a newsman, the Court should balance the competing values of a free press and the societal interest in detecting and prosecuting crime. The concurrence expressed no doubt as to the applicability of the subpoena procedure to members of the press. Rather than advocating the creation of a special procedural exception for the press, it approved recognition of First Amendment concerns within the applicable procedure.

It is apparent from Mr. Justice Powell's language that in *Branzburg, supra,* he was not advocating the creation of a new testimonial privilege for the press. He simply wished to ensure that trial judges, when exercising their broad discretion in applying the procedures extant for compelling evidence, consider the value of a free press. Throughout this case the Texas courts have consistently shown the desired consideration for the place of a free press in our society. Regardless of the analysis used, the record shows that the rights of the press were consistently protected, but in the end, the rights of the accused and the rights of society took precedence.

Petitioner's failure to discuss the Court's analysis in *Zurcher, supra,* is puzzling, particularly in light of the Court of Criminal Appeal's heavy reliance thereon below. Perhaps

this failure is understandable in light of the holding of this Honorable Court in *Zurcher, supra.*

In *Zurcher, supra,* this Honorable Court was presented with a question of whether a University student newspaper and various staff members could seek declaratory and injunctive relief against the police in order to prohibit the conducting of a search pursuant to warrant for the newspaper premises for negatives, films, and pictures revealing identities of demonstrators who assaulted police during a confrontation involving seizure of the administrative offices at a university hospital. This Honorable Court held that properly administered preconditions for search warrants constituted adequate safeguards against interference with the press' ability to gather, analyze and disseminate news. This Court declined to interpret the Fourth Amendment to impose a general Constitutional barrier against warrants to search newspapers or to demand prior notice and hearing in connection with the issuance of such warrants. The Court specifically held that "a warrant to search newspaper premises for criminal evidence such as the one issued here for news photographs taken in a public place carries no realistic threat of prior restraint or of any direct restraint whatsoever on the publication of the Daily or on it's communication of ideas." *436 U.S. at 567.* The Court noted only that "prior cases do no more than insist that the Courts apply the one requirement with particular exactitude when the First Amendment interest would be endangered by the search. As we see it, no more than this is required hence the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper. Properly administered, the pre-conditions for a warrant — probable cause, specificity with regard to the place to be searched and the things to be seized, and overall reasonableness — should afford sufficient protection

against the harms that are assertedly threatened by warrants for searching newspaper offices." *436 U.S. at 565.*

Twice this Honorable Court has been presented with an opportunity to determine the existence of an evidentiary privilege for the press emanating from the First Amendment to the Constitution of the United States. In *Branzburg, supra,* the Court refused to hold that such privilege existed where the evidence in control of the press was sought through subpoena power. In *Zurcher, supra,* the Court held that no privilege existed to prevent the applicability of the Fourth Amendment to search for evidence of criminal activity. In both instances, notwithstanding the Petitioners contrary assertions, this Court specifically rejected the creation of even a qualified privilege for the press.

The Petitioner, in an apparent attempt to lend weight to his arguments, asserts that the view he presents is the normal and accepted view of the majority of intermediate federal appellate courts, federal trial courts and state appellate and trial courts and cites numerous cases which purport to support his argument. A careful review of the cases cited, however, shows that they will not, in the main, support his assertions. Where the cases cited do support his arguments, the cases are founded upon faulty reasoning or misstatement of precedent and, it is respectfully submitted, should not be considered persuasive.

One such example of the Petitioner's missapplication of authority is where the Petitioner asserts that the opinion of the Texas Court of Criminal Appeals runs directly contrary to thirteen years of precedents from this Honorable Court, (Petition at page 19), citing this Honorable Court's opinion of *In re Roche, 448 U.S. 1312 (1980).* Petitioner fails to note, however, that *In re Roche, supra,* dealt with a situation

which is factually at odds with the instant cause. That cause, like many of the cases cited by Petitioner, dealt with a situation where the trial court was, for one reason or another, attempting to obtain from a member of the media, the identity of a confidential source. As the Court of Criminal Appeals noted in distinguishing such cases, they are neither controlling nor persuasive as they deal with a situation in which the actions of the court arguably impede the media's ability to gather or report the news. It is undisputed that no such situation is presented in the instant case. Thus all cases cited by Petitioner concerning attempts to force disclosure of confidential news sources are wholly inapposite to the situation at hand.

The Petitioner further asserts that the Court of Appeals for the Fifth Circuit has, in two cases, recognized a limited privilege for the press. A review of those cases reflects that neither case will support the Petitioner's arguments herein.

In *Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980),* the Court of Appeals first noted that Texas has no reporter's privilege statute and that the highest appellate courts in the State had not, at that time, considered the issue of testimonial privileges for the press. The Court went on to create a First Amendment privilege in libel cases which protected the right of the press to refuse to disclose the identity of a confidential informant based upon what Respondent believes to be an erroneous reading of this Honorable Court's holding in *Branzburg, supra.* The Court noted that the privilege was not absolute and when certain circumstances were presented, it would yield to the overriding concerns of the trial process. The Court justified its creation of this evidentiary privilege in libel cases because there was a "more apparent interest in protecting the confidentiality of journalist sources in libel cases than in Grand Jury

proceedings." *621 F.2d at 725.* The Court expressly distinguished its decision from that of this Honorable Court in Branzburg, supra, and recognized that this Court had refused to create such a privilege within the criminal justice process. *Miller, supra,* thus is no authority for the Petitioner's asserted position and in truth and fact, refutes his claims.

The *Miller* case does, however, demonstrate the different interests apparent in civil and criminal cases and explains why the cases cited by Petitioner which dealt with civil proceedings are neither controlling nor persuasive in the context of a criminal proceeding.

As further evidence of the fact that *Miller, supra,* is inapposite to the instant case, the Court need only look to the second Fifth Circuit case cited by the Petitioner, *In re Selcraig, 705 F.2d 789 (5th Cir. 1983).* In that case the Court of Appeals reaffirmed its position as taken in *Miller, supra,* that in libel cases the press does possess a limited privilege where a journalist is a party to the lawsuit. The Court specifically noted, however, that the judicially created privilege would not exist if the newspaperman was not a party to the lawsuit, but merely a witness. The Court refused to extend the reporter's privilege in civil cases when the reporter was a non-party witness or to establish a requirement that the parties seeking the information establish a compelling need for the information or that it is absolutely critical to a claim or defense. The Court felt that the prior rule established in *Miller, supra,* was an adequate shield for the press in libel cases. Once again, the issues in libel cases are entirely different from those in criminal cases, and the reasoning and rationale that caused the Fifth Circuit to adopt this evidentiary privilege for libel cases is not applicable to the pending case. In footnote 15 at page 799 of the

opinion in *Selcraig,* the Court of Appeals cited with approval numerous decisions of state courts uniformly holding that no evidentiary privilege exists for the press in criminal cases. Not only does the *Selcraig* case not support the Petitioner's analysis, it is authority which directly refutes his argument.

Petitioner asserts that "All of the previously reported cases from state courts in Texas have recognized and adhered to the journalist's qualified privilege to decline to produce unpublished materials and to identify confidential sources." (Petitioner's Petition at page 16). This assertion is simply false.

The first case cited by Petitioner is *Dallas Oil and Gas, Inc. v. Mouer, 533 S.W.2d 70 (Tex. Civ. App. -Dallas, 1976).* The Petitioner has previously cited this case for the proposition that the press possesses a limited privilege to decline to reveal confidential sources. According to Petitioner, the Court of Civil Appeals held that the need for disclosure would not be so compelling as to override the rights of freedom of speech and of the press. Even if it were assumed that a case dealing with disclosure of the identity of confidential informants was, in some manner, applicable in the instant cause, the Petitioner has misstated the court's holding in *Mouer, supra.*

In *Mouer, supra,* the defendants argued that the press is privileged to protect the confidentiality of its sources against disclosure in a civil case under the guarantees of the First Amendment to the United States Constitution. In responding to this contention, the Court of Civil Appeals wrote:

> We need not determine the existence and scope of this alleged constitutional privilege because we find that the constitutional issue is not squarely presented in the record. *533 S.W.2d at 76.*

The Court of Appeals did not reach the issue of privilege because the testimony was not shown to be relevant to the issues at the temporary injunction hearing wherein the trial court has refused to compel the newsman witness to reveal his sources. Since the evidence was not relevant, the trial court had discretion to exclude the testimony under traditional evidentiary rules.

While *Mouer* includes language to the effect that disclosure of confidential informants should not be compelled in the absence of a concern so compelling as to override the rights of freedom of speech and press, *533 S.W.2d at 70,* the Court of Civil Appeals noted that a newsman does not have a general privilege against disclosure of confidential sources in civil cases in Texas, Further, it held that "those courts which have denied the privilege have done so on consideration of balancing the public interest in the free flow of information against other important interests." The Court did not establish an evidentiary privilege for the press in Texas. It simply noted that within the context of whatever procedural safeguards were at issue, be they through subpoena and Motion to Quash or search warrant and suit for injunctive relief, that those procedures would include consideration of circumstances and situations unique to members of the press. This is, however, no more than saying that all witnesses, including members of the press, are to be free from vexatious and harassing subpoenas or search warrants. No evidentiary privilege is created by a recognition of the influence and importance of the press.

Petitioner also cites *Suede Originals v. Aetna Casualty Company, 8 Media L.Rep. 2565, No. 82-0532-L (District Court of Dallas County, 193rd Judicial District Court, November 19, 1982, an unpublished memorandum opinion of a trial level court)* for the proposition that Texas Courts have

"uniformly" recognized the journalist's qualified privilege and have quashed the subpoenas by which litigants seek to appropriate unpublished news or source material for their own purposes. Putting aside for the moment how the actions of one trial judge in one case constitutes a "uniform" policy, the case cited holds that the qualified journalist's privilege does exist. An analysis of the trial judge's opinion, however, shows that it is fatally flawed in that it, like the Petitioner herein, cites to cases for legal propositions for which they do not stand.

In *Suede Originals, supra,* the trial court held that a qualified journalist's privilege in both published and unpublished materials exist. The sole authority for this proposition was an unpublished 1979 Florida Circuit Court (trial court) memorandum opinion, reported in a medial law reporter, *Florida v. Morel, 4 Med. L.Rep. 2309.* No Texas cases, no Federal cases and no appellate court cases from any jurisdiction were cited in support of this conclusion.

In the course of the opinion in Suede Originals, supra, the trial judge does cite to two opinions out of Texas state courts: *Dallas Oil and Gas, Inc. v. Mouer, supra,* and *Houston Chronicle Publishing Company v. Shaffer, 630 S.W.2d 927 (Tex. Crim. App. 1982).* Both cases were cited in the opinion for the proposition that requiring newsmen to testify about unpublished materials and, more specifically, about their sources, would necessarily have a chilling effect upon the gathering and publication of news and upon the flow of information to the public. Neither case so holds.

The holding of the Court of Appeals in *Mouer, supra,* is set forth above. In *Houston Chronicle Publishing Company, supra,* the sole question presented to the court dealt with the propriety of excluding the public and the press from a

hearing in chambers on the admissibility of a confession. The opinion was directed to the right of the press to "access" in a pending criminal case. The Court did not grant to the press any greater right of access than that afforded the general public, nor did it address in any form the question of an alleged journalist's privilege. The case simply does not support the proposition for which it was cited by the trial judge in *Suede Originals, supra.*

Finally, the Petitioner cites to *In re: Grand Jury Subpoena, an unpublished memorandum opinion of the trial judge of the 105th Judicial District Court of Nueces County, Texas, in cause No. 79-CR-2157-D reported in 5 Med. L.Rep. 1153.* In that opinion the District Court ruled that the journalistic privilege has been expanded beyond civil litigation and has application in criminal proceedings. The Court therein noted that the great weight of authority refused to recognize the alleged journalistic privilege. Notwithstanding this fact, and without any authority for support, the court then proceeded to hold that such a privilege did exist. The Court then improperly cited *Mouer, supra,* for the proposition that where there is a conflict between the journalist privilege and the Grand Jury's right to evidence, a balancing test is required. As previously noted, the Court of Civil Appeals in *Mouer* dealt with a civil proceeding and not a criminal proceeding. Further, the Court therein specifically refused to consider this issue and determined the issues solely on the relevance of the material offered. The analysis of the Court in the 105th Judicial District Court is therefore predicated upon a misreading and misapplication of the authority cited therein.

Evidentiary privileges in litigation are not favored. *Herbert v. Lando, 441 U.S. 153 (1979); Miller v. Transamerican Press, Inc., supra.* Rules of privilege are substantive laws

designed to influence the conduct of individuals. See: C. McCormick, *Evidence* (2nd Ed. 1972) section 72, note 12. Unlike rules of exclusion which guard against unreliable, prejudicial or misleading evidence, privileges do not aid in the discovery of the truth. Instead, they serve to protect interests and relationships that society deems of sufficient importance to justify the suppression of facts necessary to the adjudication process. Since the protection ensured by the testimonial privilege must frustrate the workings of the fundamental principle of the trial process, that is to seek out the truth, privileges are strictly construed. Only in rare instances when a privilege serves a transcendent public good will a court thrust aside the all important search for truth. *Elkins v. United States, 346 U.S. 206, 243 (1967) (Frankfurter, J., dissenting). Accord: United States v. Nixon, 418 U.S. 683 (1974).* The requirement that all persons having competent and relevant evidence concerning the issues being litigated be available to testify is necessary. Any other rule would inhibit the very purpose of the trial process: the search for the truth. *United States v. Nixon, supra.* It is the duty of every citizen to give a court of law the information he possesses. *Lehnhard v. Moore, 401 S.W.2d 232 (Tex. 1966).*

The privilege claimed by Petitioner in the pending cause would work to subvert the truth finding process of the criminal trial. The Sixth Amendment rights of the accused are fundamental elements of due process. Compelling testimony of a witness is coexistent and coextensive with the right of the accused to present a defense and equal in importance with the right to confront an adverse witness. *Washington v. Texas, 388 U.S. 14 (1967).* No right guaranteed an accused is of greater importance for it assures him of the ability to be free from improper incarceration and deprivation of liberty and property. This constitutional right is so imperative

that it must, of necessity, override any other constitutional rights of the press or the public. *Gannett Co., Inc. v. DePasquale, 443 U.S. 593 (1976); Estes v. Texas, 381 U.S. 532 (1965).*

It need not be decided whether the press has a First Amendment privilege in an unqualified sense. This issue has long been resolved against the press. *Branzburg v. United States, supra; United States v. Criden, 633 F.2d 346 (3rd Cir. 1980).* Nor need it be decided whether the press has a qualified or unqualified privilege within the civil trial process since that factual circumstance is not presented herein. Much of the Petitioner's "authority" is, thus, inapposite. See, e.g.: *Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) (libel case); McGraw-Hill, Inc. v. Arizona, 680 F.2d 5 (2nd Cir. 1982) (civil antitrust case); Baker v. F & F Investment, 470 F.2d 139 (2nd Cir. 1972) cert. den., 411 U.S. 966 (1973) (federal civil rights case); Miller v. Transamerican Press, Inc., supra; Cervantes v. Time, Inc., 464 F.2d 1059 (9th Cir.), reh. denied, 409 F.2d 1092 (1972) (libel case).*

Neither need it be decided whether the press has an evidentiary privilege within the criminal trial process with regard to revealing confidential information or as to any conduct which would arguably interfere with the press' ability to collect or disseminate news, as those factual circumstances are also not presented.

All that need be decided in this case is whether a journalist who is a witness to an occurrence which is alleged to be a criminal act may be compelled to disclose evidence which is competent and relevant to the issues to be determined. Before this case, no Texas appellate court had resolved this issue. All other jurisdictions which have been squarely presented with an issue concerning the privilege of the press to

refuse to testify about personal observations of a criminal offense have uniformly held that a member of the press in such a situation is no different than any ordinary citizen and may be compelled to both testify and disclose evidence within his possession. See: *In re Selcraig, 705 F.2d 789 (5th Cir. 1983); In re Ziegler, 9 Med. L.Rep. 1013 (W.D.N.Y. 1982); State v. Knor, 8 Med. L.Rep. 2967 (Or.Cir.Ct. 1982); Rosato v. Superior Court, 51 Cal. App. 3d 190 (1975); People v. Dan, 342 N.Y.S.2d 731 (1973); Lightman v. State, 294 A.2d 149 (1972); State v. Knops, 183 N.W.2d 93 (Wis. 1971); Branzburg v. Pound, 461 S.W.2d 345 (Ky. App. 1970); United States v. Liddy, 354 F.Supp. 208 (D.D.C. 1972); In re: McGowen, 298 A.2d 339 (D. Supp. Ct. 1972); Riley v. City of Chester, 612 F.2d 708 (3rd Cir. 1979).*

A complete review of the case authority and arguments presented by the Petitioner in this Petition is beyond the scope of this Brief in Opposition. Even a cursory review, however, shows that much of the "authority" cited is wholly irrelevant to the question presented to this Honorable Court. Texas has not, as a matter of state law, adopted a journalist's privilege, qualified or unqualified. Further, there is no such privilege extant in the Federal Constitution. The cases cited by Petitioner to support his argument not only do not do so, many expressly reject the argument advanced in this Petition. See, e.g.: *Miller v. Transamerican Press, Inc., supra.*

In the pending case the Respondent was presented with a situation in which the journalist witness waived his alleged privilege not to testify, but thereafter refused to disclose relevant material in his possession, invoking a supposed journalistic privilege. A hearing was conducted wherein it was determined that the witness, who had voluntarily taken the stand and testified to personal observations, also had in his

possession and under his control physical evidence, to-wit: photographs of alleged criminal conduct taken in a public place. This evidence was competent and relevant to issues being litigated. In this situation the well recognized right of a citizen accused of a criminal offense to compulsory process of witnesses and to the presentation of testimony and the disclosure of evidence was paramount to any concern or privilege claimed by the Petitioner.

The Petitioner was held in contempt of Court for failure to comply with the lawful order of the Court. Journalistic privilege to refrain from presenting evidence in a criminal trial is not recognized in Texas. See, e.g., *Tex. Civ. Evid. R. 501 et seq.* Neither is the alleged privilege recognized in Federal law. See, e.g.: *Fed. R. Evid. 501 et seq.* In this situation the Petitioner was no different from any ordinary citizen and it was within the power of the Respondent to require him to testify and to disclose evidence in his possession. The Petitioner did not interpose a defense that the material was not relevant, that the material was not available, that the request was overly broad, that the request was unnecessarily vexatious, or that the request was being made in bad faith. In weighing the competing values, the Respondent ruled that the rights of the accused citizen in this situation were paramount and denied the privilege. Since there is no controlling case authority, statutory authority or constitutional rationale for the judicial establishment of a privilege for the press that would permit a journalist to impede the criminal trial process and the search for the truth, the Petition for Writ of Certiorari should be denied in that the Petitioner is not illegally restrained or confined of his liberty.

CONCLUSION

For the foregoing reasons, we respectfully suggest that the Petition for Certiorari be denied.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF TEXAS }
COUNTY OF DALLAS }

Before me, the undersigned Notary Public in and for the State of Texas, on this day personally appeared R. K. Weaver, who being duly sworn, upon oath stated: I, R. K. Weaver, am a member of the Bar of the Supreme Court of the United States and have been retained as attorney of record for Respondent, the Honorable Robert Moss, Judge of the County Criminal Court No. 10 of Dallas County, Texas.

I further state upon oath that on the 2nd day of October, 1985, I served copies of the foregoing Respondent's Brief in Opposition to a Writ of Certiorari to the Texas Court of Criminal Appeals on the Petitioner by depositing same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit: John H. McElhaney, Esq., Locke, Purnell, Boren, Laney & Neely, 3600 Republic Bank Tower, Dallas, Texas, 75201, Mr. Henry Wade, Criminal District Attorney, Dallas County Courthouse, Dallas, Texas, 75202, and Mr. Roark Reed, Attorney at Law, Southern Methodist University, School of Law, 3315 Daniel, Dallas, Texas 75275.

RICHARD KRISTIN WEAVER

SUBSCRIBED and SWORN TO before me by the said Richard Kristin Weaver, this 2nd day of October, 1985.

NOTARY PUBLIC
State of Texas

My commission expires: